

APPENDIX A

Initial Regulatory Flexibility Analysis

1 As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹¹⁷ the Federal Communications Commission (Commission) has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided in paragraph 56 of the item. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).¹¹⁸ In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.¹¹⁹

A. Need for, and Objectives of, the Proposed Rules**1. Background**

2 On December 8, 2003, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act)¹²⁰ to address the growing number of unwanted commercial electronic mail messages, which Congress determined to be costly, inconvenient, and often fraudulent or deceptive.¹²¹ Congress found that recipients “who cannot refuse to accept such mail” may incur costs for storage, and “time spent accessing, reviewing, and discarding such mail.”¹²² The CAN-SPAM Act prohibits any person from transmitting such messages that are false or misleading and gives recipients the right to decline to receive additional messages from the same source.¹²³ Certain agencies, including the Commission, are charged with enforcement of the CAN-SPAM Act.¹²⁴

3 Section 14 of the CAN-SPAM Act requires the Commission to (1) promulgate rules to protect consumers from unwanted mobile service commercial messages, and (2) in doing

¹¹⁷ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹¹⁸ See 5 U.S.C. § 603(a).

¹¹⁹ See 5 U.S.C. § 603(a).

¹²⁰ Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (*CAN-SPAM Act*).

¹²¹ See *CAN-SPAM Act*, Section 2(a).

¹²² See *CAN-SPAM Act*, Section 2(a). Congress also found that the growth of unsolicited commercial electronic mail “imposes significant monetary costs” on Internet access service providers.

¹²³ *CAN-SPAM Act*, Section 5. Section 4 of the CAN-SPAM Act also provides criminal sanctions for certain fraudulent activity in connection with sending electronic messages which Congress found to be particularly egregious. *CAN-SPAM Act*, Section 4.

¹²⁴ See *CAN-SPAM Act*, Sections 4, 7(a), 7(b), 7(c), and 14.

**STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re. In the Matter of Policies and Rules Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos 04-53 and 02-278, Notice of Proposed Rulemaking in CG Docket No. 04-53 and Further Notice of Proposed Rulemaking in CG Docket No. 02-278.

I support this item which begins the process for the Commission to fulfill its statutory duties under the CAN-SPAM Act of 2003

I write separately to express my concern that we act expeditiously on the further notice regarding the "safe harbor" for autodialed and prerecorded message calls to wireless numbers that were recently ported from a wireline to a wireless service provider. Our rules allow certain telemarketing calls to consumers, and parties making such calls do not want to inadvertently violate the law because the number in their database has recently been transferred to a wireless phone. I think this item should have gone further and incorporated the Direct Marketing Association and Newspaper Association of America's Petition for Declaratory Ruling filed with the Commission on January 29, 2004, to fully address the industry's concerns.

so consider the ability of senders to determine whether a message is a mobile commercial electronic mail message. In addition, the Commission shall consider the ability of senders of mobile service commercial messages to comply with the CAN-SPAM Act in general. Furthermore, the CAN-SPAM Act requires the Commission to consider the relationship that exists between providers of such services and their subscribers.

4. The Telephone Consumer Protection Act (TCPA)¹²⁵ was enacted to address certain telemarketing practices, including calls to wireless telephone numbers, which Congress found to be an invasion of consumer privacy and even a risk to public safety.¹²⁶ The TCPA specifically prohibits calls using an autodialer or artificial or prerecorded message “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.”¹²⁷ In addition, the TCPA required the Commission to “initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers’ privacy rights” and to consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements.¹²⁸

5. In 2003, the Commission released a Report and Order (2003 TCPA Order) revising the TCPA rules to respond to changes in the marketplace for telemarketing.¹²⁹ Specifically, we established in conjunction with the Federal Trade Commission (FTC) a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls. The national do-not-call registry supplements long-standing company-specific rules which require companies to maintain lists of consumers who have directed the company not to contact them. In addition, we determined that the TCPA prohibits *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number.¹³⁰ We concluded that this encompasses both voice calls and text calls to wireless numbers including, for example, Short Message Service calls.¹³¹ We acknowledged that, beginning in November of 2003, numbers previously used for wireline service could be ported to wireless service providers and that telemarketers will need to take the steps necessary to identify these numbers.¹³² Intermodal local number portability (LNP) went into effect November, 2003.

6. The 2003 TCPA Order required that telemarketers use the national do-not-call registry maintained by the FTC to identify consumers who have requested not to receive telemarketing calls. Currently, in order to avail themselves of the safe harbor for telemarketers, a telemarketer is required to update or “scrub” its call list against the national do-not-call registry

¹²⁵ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. §§ 201 *et seq.*

¹²⁶ See TCPA, Section 2(5), *reprinted in* 7 FCC Rcd 2736 at 2744.

¹²⁷ 47 U.S.C. § 227(b)(1)(A)(iii).

¹²⁸ 47 U.S.C. § 227(c)(1)-(4).

¹²⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003) (2003 TCPA Order).

¹³⁰ 2003 TCPA Order, 18 FCC Rcd at 14115, para. 165.

¹³¹ See 2003 TCPA Order, 18 FCC Rcd at 14115, para. 165.

¹³² 2003 TCPA Order, 18 FCC Rcd at 14117, para. 170.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

RE. Rules and Regulation Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (NPRM).

Congress has given us an aggressive schedule according to which we must adopt rules implementing the CAN-SPAM act by the end of September. So I'm eager to get the process started, and am glad we are doing so this morning with this NPRM

To make this happen, we will have to be just as aggressive as Congress was in giving us this charge. There are tough definitional decisions to be made here and a complicated web of statutes to integrate. So we need a good, full record and a really rapid turn-around to get the job done. But the reward will be consumers empowered to better control what they receive and what they pay for. So thanks to the Bureaus for bringing the item to us and I look forward to seeing a final item before the 270 days elapse. It may require a long summer night or two!

every 90 days. Recently the FTC released a Notice of Proposed Rulemaking proposing to amend its safe-harbor provision and require telemarketers to update their call lists every 30 days.¹³³ This Notice proposes to modify the Commission's rules to parallel any changes to the FTC's rules. With this amendment, all telemarketers would be required to scrub their lists against the national do-not-call registry every 30 days in order to avail themselves of that safe harbor.

2. Issues Raised in Notice

7 This Notice addresses three policy and rule modifications. First, it initiates a proceeding to implement the CAN-SPAM Act by enacting regulations to protect consumers from unwanted mobile service commercial messages. Second, under the TCPA we are exploring the need for a safe harbor for telemarketers who call telephone numbers that have been recently ported from wireline to wireless service. Third, we propose a change to the existing telemarketing safe-harbor provision which would require telemarketers to access the do-not-call registry every 30 days.

B. Legal Basis

8 The proposed action is authorized under Sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended; the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699; and the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

9 The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.¹³⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹³⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹³⁶ A "small business concern" is one which: (1) is independently owned and operated, (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹³⁷

10 The regulations and policies proposed in this item on telephone solicitation and the prohibitions of sending electronic commercial mail messages apply to a wide range of

¹³³ See *Telemarketing Sales Rule*, Notice of Proposed Rulemaking, Federal Trade Commission, 69 Fed. Reg. 7330 (February 13, 2004).

¹³⁴ 5 U.S.C. § 603(b)(3).

¹³⁵ 5 U.S.C. § 601(6).

¹³⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹³⁷ 15 U.S.C. § 632.

**STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re In the Matter of Policies and Rules Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 04-53 and 02-278, Notice of Proposed Rulemaking in CG Docket No. 04-53 and Further Notice of Proposed Rulemaking in CG Docket No. 02-278

American consumers have every right to expect that their cell phones will be spam-free zones. With this broad proceeding, we comply with Congress's mandate, pursuant to the CAN-SPAM Act of 2003, to protect consumer and businesses from the cost, inefficiencies, and inconveniences of unwanted messages sent to their wireless devices

The proceeding explores various options to allow subscribers to avoid such messages, seeks comment on technical mechanisms that can be made available to wireless subscribers, and takes into account the efficacy and cost considerations of these specific mechanisms to fulfill the requirements of the Act

Similarly, we seek further comment on the various restrictions imposed by the Telephone Consumer Protection Act (TCPA) since implementation of intermodal local number portability

I look forward to consulting with my colleagues at the Federal Trade Commission on this rulemaking to maximize the consistency of our respective rules and to implement Congress's directive to protect consumers from unwanted mobile service commercial messages.

entities, including all entities that use the telephone or electronic messaging to advertise. That is, our actions affect the myriad of businesses throughout the nation that use telemarketing or electronic messaging to advertise. We have attempted to identify, with as much specificity as possible, all business entities that potentially may be affected by the policies and rules proposed herein, but are not expanding in this analysis the scope of entities possibly subject to requirements adopted in this proceeding beyond the scope described in the Notice itself. In order to assure that we have covered all possible entities we have included general categories, such as Wireless Service Providers and Wireless Communications Equipment Manufacturers, while also including more specific categories, such as Cellular Licensees and Common Carrier Paging. Similarly, for completeness, we have also included descriptions of small entities in various categories, such as 700 MHz Guard Band Licenses, who may potentially be affected by this proceeding but who would not be subject to regulation simply because of their membership in that category.

11 Sometimes when identifying small entities we provide information describing auctions' results, including the number of small entities that were winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants provide business size information, nor does the Commission track subsequent business size, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated. Consequently, to assist the Commission in analyzing the total number of potentially affected small entities, we request that commenters estimate the number of small entities that may be affected by any changes.

12 **Small Businesses.** Nationwide, there are a total of 22.4 million small businesses, according to SBA data.¹³⁸

13. **Telemarketers.** SBA has determined that "telemarketing bureaus" with \$6 million or less in annual receipts qualify as small businesses.¹³⁹ For 1997, there were 1,727 firms in the "telemarketing bureau" category, total, which operated for the entire year.¹⁴⁰ Of this total, 1,536 reported annual receipts of less than \$5 million, and an additional 77 reported receipts of \$5 million to \$9,999,999. Therefore, the majority of such firms can be considered to be small businesses.

14. **Wireless Service Providers.** The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"¹⁴¹ and "Cellular and Other Wireless Telecommunications."¹⁴² Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census

¹³⁸ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

¹³⁹ See 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 561422.

¹⁴⁰ U.S. Census Bureau, 1997 Economic Census, Subject Series "Administrative and Support and Waste Management and Remediation Services," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 561422 (issued October 2000).

¹⁴¹ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

¹⁴² 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

calls to recently ported wireless numbers which, according to telemarketers, could make compliance with the TCPA's prohibition difficult for callers using autodialers and prerecorded messages. Small businesses, which disagree with the Commission's determination and believe the creation of a safe harbor would impact their business in a negative way, are requested to file comments and advise the Commission about such an impact.²³⁹

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

48. No federal rules conflict with the rules discussed in this item; however, there are areas in which the CAN-SPAM Act and the TCPA may overlap as indicated in the primary item. In addition, the Commission is required to consult with the FTC on its rulemaking. The FTC is charged with implementing and enforcing most of the CAN-SPAM Act, including criteria that further defines items that the Commission rules will reference. The FTC is conducting its own rulemaking concurrently, although most of the FTC's deadlines occur after the Commission's rules must be promulgated. The TCPA and the Telemarketing Sales Rule (enforced by the FTC) are duplicative in part.

²³⁹ See Notice *supra* para. 49

Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.¹⁴³ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.¹⁴⁴ Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.¹⁴⁵ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.¹⁴⁶ Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

15. **Internet Service Providers.** The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments “primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.”¹⁴⁷ Under the SBA size standard, such a business is small if it has average annual receipts of \$21 million or less.¹⁴⁸ According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.¹⁴⁹ Of these, 2,659 firms had annual receipts of under \$10 million, and an additional 67 firms had receipts of between \$10 million and \$24,999,999.¹⁵⁰ Thus, under this size standard, the great majority of firms can be considered small entities

16 **Wireless Communications Equipment Manufacturers.** The Commission has not developed special small business size standards for entities that manufacture radio, television, and wireless communications equipment. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to “Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.” Examples of products that fall under this category include “transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and

¹⁴³ U.S. Census Bureau, 1997 Economic Census, Subject Series “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax. 1997, NAICS code 513321 (issued October 2000)

¹⁴⁴ U.S. Census Bureau, 1997 Economic Census, Subject Series “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax. 1997, NAICS code 513321 (issued October 2000) The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees, the largest category provided is “Firms with 1000 employees or more”

¹⁴⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax. 1997, NAICS code 513322 (issued October 2000).

¹⁴⁶ U.S. Census Bureau, 1997 Economic Census, Subject Series “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax. 1997, NAICS code 513322 (issued October 2000) The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees, the largest category provided is “Firms with 1000 employees or more”

¹⁴⁷ Office of Management and Budget, North American Industry Classification System, page 515 (1997) NAICS code 514191, “On-Line Information Services” (changed to current name and to code 518111 in October 2002)

¹⁴⁸ 13 C.F.R. § 121.201, NAICS code 518111

¹⁴⁹ U.S. Census Bureau, 1997 Economic Census, Subject Series “Information,” Table 4, Receipts Size of Firms Subject to Federal Income Tax. 1997, NAICS code 514191 (issued October 2000)

¹⁵⁰ U.S. Census Bureau, 1997 Economic Census, Subject Series “Information,” Table 4, Receipts Size of Firms Subject to Federal Income Tax. 1997, NAICS code 514191 (issued October 2000)

in that they might need to obtain and retain a secret code from particular subscribers²³⁴ This code would be required to get their commercial messages past the filter. We expect that obtaining and retaining a code from particular subscribers would be a minimal burden on the small business that chooses to filter its messages to keep out unwanted ones. Depending on how the system is set up, there might be a small burden on the carriers for enabling such a filtering mechanism. In order for the system to work, there might be a requirement that small businesses sending these messages mark or tag them as commercial. We anticipate that any burden of marking or tagging messages would be very small.

45 The other alternative we discuss is whether there should be an option to use a website interface for subscribers, including small businesses, to change their filtering options²³⁵ The alternative might require businesses, including small businesses, to develop a website for collecting addresses of subscribers that want to reject future messages. We also discuss the possibility of using a webpage for subscribers to notify senders that they do not want such messages. As far as we can determine at this time, this alternative would be the most difficult for small businesses to implement in terms of staff resources, cost, software development and use, and Internet access and website development. We would appreciate hearing from small businesses if this is an accurate assessment

2. TCPA

46. The Commission is also considering modifications to the TCPA safe-harbor provision.²³⁶ This modification would require that telemarketers scrub their lists on a monthly, rather than quarterly, basis. An alternative to this proposed rule change is to leave the rule the way it currently stands. An advantage to not changing the rule is that there would be no increased burden on small businesses. Businesses would continue to scrub their own call lists every three months. The disadvantage to not changing the rule is that the FTC and Commission rules might be inconsistent with one another. Small businesses subject to the jurisdiction of both agencies would be faced with this inconsistency. Congress has directed us to maximize consistency with the FTC's rules. In addition, we believe that it is easier and less burdensome for small businesses if the two agencies have consistent requirements.

47 The TCPA specifically prohibits calls using an autodialer or artificial or prerecorded message to any wireless telephone number²³⁷ With the advent of intermodal number portability it became important for companies engaged in telemarketing to track recently ported numbers in order to ensure continued compliance with the TCPA. The Commission is now considering the adoption of a limited safe harbor for autodialed and prerecorded message calls to wireless numbers that were recently ported from a wireline service to a wireless service provider.²³⁸ It is our belief that such an alternative will not have a significant economic impact on any small businesses, only a benefit. The alternative would be to not adopt a safe harbor for

²³⁴ See *Notice supra* para. 37.

²³⁵ See *Notice supra* para 37

²³⁶ See *Notice supra* paras 52-53

²³⁷ See *Notice supra* para 43

²³⁸ See *Notice supra* para 46

radio and television studio and broadcasting equipment”¹⁵¹ and may include other devices that transmit and receive Internet Protocol enabled services, such as personal digital assistants. Under that standard, firms are considered small if they have 750 or fewer employees.¹⁵² Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments¹⁵³ in this category.¹⁵⁴ Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless equipment manufacturers in this category is approximately 61.35%,¹⁵⁵ so the Commission estimates that the number of wireless equipment manufacturers with employment under 500 was actually closer to 706, with an additional 23 establishments having employment of between 500 and 999. Given the above, the Commission estimates that the great majority of wireless communications equipment manufacturers are small businesses.

17 **Radio Frequency Equipment Manufacturers.** The Commission has not developed a special small business size standard applicable to Radio Frequency Equipment Manufacturers. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to “Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.” Under that standard, firms are considered small if they have 750 or fewer employees.¹⁵⁶ Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments¹⁵⁷ in this category.¹⁵⁸ Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. Thus, under this size standard, the majority of establishments can be considered small entities.

18. **Paging Equipment Manufacturers.** The Commission has not developed a special small business size standard applicable to Paging Equipment Manufacturers. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to “Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.”

¹⁵¹ 13 C.F.R. § 121.201, NAICS code 334220

¹⁵² 13 C.F.R. § 121.201, NAICS code 334220

¹⁵³ The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses.

¹⁵⁴ U.S. Census Bureau, 1997 Economic Census, Industry Series. “Manufacturing,” Table 4, Industry Statistics by Employment Size. 1997, NAICS code 334220 (issued August 1999).

¹⁵⁵ U.S. Census Bureau, 1997 Economic Census, Industry Series. “Manufacturing,” Table 5, Industry Statistics by Industry and Primary Product Class Specialization. 1997, NAICS code 334220 (issued August 1999).

¹⁵⁶ 13 C.F.R. § 121.201, NAICS code 334220

¹⁵⁷ The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses.

¹⁵⁸ U.S. Census Bureau, 1997 Economic Census, Industry Series. “Manufacturing,” Table 4, Industry Statistics by Employment Size. 1997, NAICS code 334220 (issued August 1999).

which sending a mobile service commercial message is not acceptable;²²⁸ and (2) the use of a challenge-response mechanism to reject electronic commercial messages.²²⁹ The burden of each alternative on small businesses as senders is minimal. We expect that the burden of alternative one on small carriers to be minimal as well.

42 Alternative one allows senders to recognize mobile service messaging by the recipient's electronic mail message address. The Commission is considering the requirement that domain names be used to identify carriers' mobile service messaging clients.²³⁰ We expect that if domain name changes are required, the burden will rest on carriers, including small carriers, to change the domain names of their clients. We anticipate that this burden on carriers will be minimal. We also expect there to be a slight burden on those small businesses that chose to use the special domain names to limit incoming commercial messages. These small businesses might need to reprint or alter letterhead, business cards, or advertising material to reflect the name change. We note, however, that for businesses choosing this option, those burdens would be offset by the savings they would realize from a reduction in unwanted mobile service commercial messages. We consider this burden on small businesses *receiving* commercial messages to be a less burdensome alternative than the alternative described in paragraph 37 above that would require the establishment of an individual "Do-Not-E-Mail" registry and would result in a significant burden on small businesses *sending* commercial messages.

43 The second alternative considered is the challenge-response alternative, which might also require electronic mail messages to be identified as commercial.²³¹ The identification process, known as "tagging," would then allow recipients to use software that would reject or hold such electronic mail. This challenge-response process requires a software trigger that would require confirmation from the sender before forwarding the message to the intended recipient or would return the first message from a sender with a standard response noting that the intended recipient is a mobile service messaging subscriber. Although there might be a burden imposed on senders to mark their commercial messages, this alternative would free all businesses, including small businesses, from having to pre-screen their mailing lists before sending messages. The burden on small business senders would be to note the addressee's status and refrain from sending to that address unless the recipient provided prior express authorization.²³² This alternative would place a slight burden on small businesses that use electronic mail messaging for commercial purposes. We expect that it would impose a significant burden on the software design companies and the manufacturers of wireless message receiving devices.

44 In regard to rejecting future messages, we note that two alternatives are discussed.²³³ One involves a filtering mechanism. A filtering mechanism would burden senders

²²⁸ See Notice *supra* paras. 27-28.

²²⁹ See Notice *supra* para. 32.

²³⁰ See Notice *supra* paras. 27-28.

²³¹ See Notice *supra* paras. 32-34.

²³² See Notice *supra* paras. 35-36.

²³³ See Notice *supra* para. 37.

Under that standard, firms are considered small if they have 750 or fewer employees.¹⁵⁹ Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments¹⁶⁰ in this category.¹⁶¹ Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. Thus, under this size standard, the majority of establishments can be considered small entities.

19 **Telephone Equipment Manufacturers.** The Commission has not developed a special small business size standard applicable to Telephone Equipment Manufacturers. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to "Telephone Apparatus Manufacturing." Under that standard, firms are considered small if they have 1,000 or fewer employees.¹⁶² Census Bureau data indicates that for 1997 there were 598 establishments that manufacture telephone equipment.¹⁶³ Of those, there were 574 that had fewer than 1,000 employees, and an additional 17 that had employment of 1,000 to 2,499.¹⁶⁴ Thus, under this size standard, the majority of establishments can be considered small.

20. As noted in paragraph 10, we believe that all small entities affected by the policies and proposed rules contained in this Notice will fall into one of the large SBA categories described above. In an attempt to provide as specific information as possible, however, we are providing the following more specific categories.

21. **Cellular Licensees.** The SBA has developed a small business size standard for wireless firms within the broad economic census category "Cellular and Other Wireless Telecommunications."¹⁶⁵ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.¹⁶⁶ Of this total, 965 firms had employment of 999 or fewer

¹⁵⁹ 13 C.F.R. § 121.201, NAICS code 334220

¹⁶⁰ The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses.

¹⁶¹ U.S. Census Bureau, 1997 Economic Census, Industry Series "Manufacturing," Table 4, Industry Statistics by Employment Size, 1997, NAICS code 334220 (issued August 1999).

¹⁶² 13 C.F.R. § 121.201, NAICS code 334210

¹⁶³ The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical location may be an establishment, even though that location and others may be owned by a given firm. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses.

¹⁶⁴ U.S. Census Bureau, 1997 Economic Census, Industry Series "Manufacturing," Table 4, Industry Statistics by Employment Size, 1997, NAICS code 334210 (issued September 1999).

¹⁶⁵ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

¹⁶⁶ U.S. Census Bureau, 1997 Economic Census, Subject Series "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax, 1997, NAICS code 513322 (issued October 2000).

list against the “Do-Not-E-Mail” list. We know the cost of obtaining the FTC’s do-not-call registry is a maximum of \$7,375 per year and for many small businesses it is free. We estimate that the cost of scrubbing against a Do-Not-E-Mail registry to be approximately \$300 – 400 per month for a small telemarketing business. Who would pay for such a list to be compiled and maintained has not been determined; however, we expect this burden on small businesses to be significant.

2. TCPA

38. The proposed change in the safe-harbor rules, which would require telemarketers to update their lists monthly instead of quarterly, has no additional compliance cost for accessing the national do-not-call registry, because once a telemarketer has paid its fee to the FTC the telemarketer may access the list as often as it wants, up to once a day.²²⁵ There may, however, be an increase in costs associated with scrubbing the telemarketer’s call list more frequently. These increased costs might include an increase in staff time to scrub the call list or payments to a third party for “scrubbing” services. Many small businesses perform these “scrubbing” operations internally and therefore the cost is in staff time and data processing resources. Other small businesses chose to hire outside parties to scrub their lists. We estimate the cost of scrubbing such a list to be \$300 – 400 per month for a small telemarketing business.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

39. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards, and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”²²⁶

1. CAN-SPAM

40. Initially, we note that the rules are intended to protect subscribers, including small businesses, from unwanted mobile service commercial messages. Congress found these unwanted messages to be costly and time-consuming.²²⁷ Therefore, these measures should benefit small businesses by reducing cost and time burdens on small businesses that receive such messages.

41. There are two alternatives, which might be used in combination, considered in the Notice to minimize the burden on some small businesses that send mobile commercial electronic mail messages. These alternatives are (1) the use of a domain name to indicate those entities to

²²⁵ See Notice *supra* paras 52-53.

²²⁶ 5 U.S.C. § 603(c)(1) – (c)(4).

²²⁷ See CAN-SPAM Act, Section 2(a).

employees, and an additional 12 firms had employment of 1,000 employees or more¹⁶⁷ Thus, under this category and size standard, the great majority of firms can be considered small. According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of cellular service, personal communications service, or specialized mobile radio telephony services, which are placed together in the data.¹⁶⁸ We have estimated that 294 of these are small, under the SBA small business size standard.¹⁶⁹

22. **Common Carrier Paging.** The SBA has developed a small business size standard for wireless firms within the broad economic census categories of "Cellular and Other Wireless Telecommunications."¹⁷⁰ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.¹⁷¹ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more¹⁷² Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

23. In the *Paging Second Report and Order*, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.¹⁷³ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years¹⁷⁴ The SBA has approved this definition.¹⁷⁵ An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.¹⁷⁶ Fifty-seven companies claiming small

¹⁶⁷ U.S. Census Bureau, 1997 Economic Census, Subject Series "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax 1997, NAICS code 513322 (issued October 2000) The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees, the largest category provided is "Firms with 1000 employees or more"

¹⁶⁸ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

¹⁶⁹ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003) This source uses data that are current as of December 31, 2001

¹⁷⁰ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002)

¹⁷¹ U.S. Census Bureau, 1997 Economic Census, Subject Series "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax 1997, NAICS code 513321 (issued October 2000)

¹⁷² U.S. Census Bureau, 1997 Economic Census, Subject Series "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax 1997, NAICS code 513321 (issued October 2000) The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees, the largest category provided is "Firms with 1000 employees or more"

¹⁷³ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999)

¹⁷⁴ *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179

¹⁷⁵ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998

¹⁷⁶ See "929 and 931 MHz Paging Auction Closes," *Public Notice*, 15 FCC Rcd 4858 (WTB 2000)

small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

34 In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

1. CAN-SPAM

35 It is difficult to assess the cost of compliance for this item given the multiple avenues and the varied, layered approaches to protecting consumers from the unwanted commercial electronic mail messages under consideration. The umbrella analysis is that if a small business which currently engages in sending commercial electronic mail messages as part of its advertising campaign ceases sending such commercial messages, then there is no cost to comply with any prohibition being considered. Congress noted that the CAN-SPAM Act only addresses *unwanted* messages, so the loss of business for senders that may result from the decrease in advertising in this manner should be nominal.

36 Proposed in this item is the development of a small list of electronic mail addressing domains.²²³ The development of specific domain names might require providers to change addressing systems if domain names are not already distinguishable, and to register such names. If the Commission then prohibited the sending of commercial messages to such domains, businesses, including small businesses, that send commercial electronic mail would be required to check such a list before sending such messages. Because the list would be small, only containing the list of relevant providers of such domains, we do not anticipate the compliance burden of checking such a list to be great.

37 The alternative considered that creates the greatest compliance burden on small entities appears to be the use of a registry of individual electronic addresses.²²⁴ This alternative would not require providers to register names, but would instead require subscribers, including small businesses, to register their addresses on a list similar to the telemarketing do-not-call registry. Small businesses sending commercial electronic mail messages would then be required to prescreen or check this list. It is unclear how many listings there would be, but given consumer frustration over the number of unwanted electronic commercial messages, we expect a large number of individuals and businesses to register. The costs to small businesses sending commercial electronic mail messages associated with this requirement would be the cost of acquiring the "Do-Not-E-Mail" list and the cost of "scrubbing" the small business's solicitation

²²³ See Notice *supra* paras 27-28

²²⁴ See Notice *supra* para 29

business status won 440 licenses.¹⁷⁷ An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.¹⁷⁸ One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.¹⁷⁹ Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services.¹⁸⁰ Of these, we estimate that 589 are small, under the SBA-approved small business size standard.¹⁸¹ We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

24 **Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years.¹⁸² The SBA has approved these definitions.¹⁸³ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

25 **Wireless Telephony.** Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The SBA has developed a small business size standard for "Cellular and Other Wireless Telecommunications" services.¹⁸⁴ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹⁸⁵ According to the most recent *Trends in Telephone Service* data, 719 carriers

¹⁷⁷ See "929 and 931 MHz Paging Auction Closes," *Public Notice*, 15 FCC Rcd 4858 (WTB 2000).

¹⁷⁸ See "Lower and Upper Paging Band Auction Closes," *Public Notice*, 16 FCC Rcd 21821 (WTB 2002).

¹⁷⁹ See "Lower and Upper Paging Bands Auction Closes," *Public Notice*, 18 FCC Rcd 11154 (WTB 2003).

¹⁸⁰ See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 (Number of Telecommunications Service Providers that are Small Businesses) (May 2002).

¹⁸¹ 13 C.F.R. § 121.201, NAICS code 517211.

¹⁸² Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879, para. 194 (1997).

¹⁸³ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

¹⁸⁴ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

¹⁸⁵ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

September 21, 2000.²¹⁴ Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.²¹⁵

32 **Specialized Mobile Radio** The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.²¹⁶ The Commission awards "very small entity" bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.²¹⁷ The SBA has approved these small business size standards for the 900 MHz Service.²¹⁸ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.²¹⁹ A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.²²⁰

33. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.²²¹ In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold.²²² Of the 22 winning bidders, 19 claimed

²¹⁴ See "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," *Public Notice*, 15 FCC Rcd 18026 (2000).

²¹⁵ See "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

²¹⁶ 47 C.F.R. § 90.814(b)(1).

²¹⁷ 47 C.F.R. § 90.814(b)(1).

²¹⁸ See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

²¹⁹ See "Correction to Public Notice DA 96-586: FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas," *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

²²⁰ See "Multi-Radio Service Auction Closes," *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

²²¹ See, "800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes, Winning Bidders Announced," *Public Notice*, 15 FCC Rcd 17162 (2000).

²²² See, "800 MHz SMR Service Lower 80 Channels Auction Closes, Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 1736 (2000).

reported that they were engaged in the provision of wireless telephony.¹⁸⁶ We have estimated that 294 of these are small under the SBA small business size standard.

26 **Broadband Personal Communications Service.** The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹⁸⁷ For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁸⁸ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁸⁹ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.¹⁹⁰ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.¹⁹¹

27 On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses.¹⁹² Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

28 **Narrowband Personal Communications Services.** The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of \$40 million or less.¹⁹³ Through these

¹⁸⁶ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

¹⁸⁷ See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852, paras. 57-60 (1996), see also 47 C.F.R. § 24.720(b).

¹⁸⁸ See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852, para. 60.

¹⁸⁹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

¹⁹⁰ FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (released January 14, 1997).

¹⁹¹ See "C, D, E, and F Block Broadband PCS Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

¹⁹² See "C and F Block Broadband PCS Auction Closes, Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 2339 (2001).

¹⁹³ Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196, para. 46 (1994).

more than \$3 million for the preceding three years.²⁰³ The SBA has approved these small size standards.²⁰⁴ An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.²⁰⁵ A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.²⁰⁶ Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.²⁰⁷

30 **Upper 700 MHz Band Licenses.** The Commission released a *Report and Order*, authorizing service in the upper 700 MHz band.²⁰⁸ This auction, previously scheduled for January 13, 2003, has been postponed.²⁰⁹

31. **700 MHz Guard Band Licenses.** In the *700 MHz Guard Band Order*, we adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²¹⁰ A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.²¹¹ Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.²¹² SBA approval of these definitions is not required.²¹³ An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on

²⁰³ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, 1088, para. 173 (2002).

²⁰⁴ See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

²⁰⁵ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

²⁰⁶ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

²⁰⁷ See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

²⁰⁸ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001).

²⁰⁹ See “Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Rescheduled,” *Public Notice*, 16 FCC Rcd 13079 (WTB 2003).

²¹⁰ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

²¹¹ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5343, para. 108 (2000).

²¹² See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5343, para. 108 (2000).

²¹³ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5343, para. 108 n. 246 (for the 746-764 MHz and 776-794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.¹⁹⁴ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.¹⁹⁵ A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.¹⁹⁶ A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.¹⁹⁷ The SBA has approved these small business size standards.¹⁹⁸ A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.¹⁹⁹ Three of these claimed status as a small or very small entity and won 311 licenses.

29 **Lower 700 MHz Band Licenses.** We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.²⁰⁰ We have defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.²⁰¹ A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.²⁰² Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is "entrepreneur," which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not

¹⁹⁴ See "Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674," *Public Notice*, PNWL 94-004 (released Aug. 2, 1994), "Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses, Winning Bids Total \$490,901,787," *Public Notice*, PNWL 94-27 (released Nov. 9, 1994).

¹⁹⁵ Amendment of the Commission's Rules to Establish New Personal Communications Services, *Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000).

¹⁹⁶ Amendment of the Commission's Rules to Establish New Personal Communications Services, *Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000).

¹⁹⁷ Amendment of the Commission's Rules to Establish New Personal Communications Services, *Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000).

¹⁹⁸ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

¹⁹⁹ See "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

²⁰⁰ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

²⁰¹ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, 1087-88, para. 172 (2002).

²⁰² See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, 1087-88, para. 172 (2002).